ALASKA LABOR RELATIONS AGENCY
3301 EAGLE STREET, SUITE 208
P.O. BOX 107026
ANCHORAGE, ALASKA 99510-7026
(907) 269-4895
Fax (907) 269-4898

ALASKA COMMUNITY COLLEGES' FEDERATION OF TEACHERS, LOCAL 2404, AFT, AFL-CIO,

Complainant,

vs.

UNIVERSITY OF ALASKA,

Respondent.

CASE NO. 95-319-ULP

DECISION AND ORDER NO. 191

This matter was heard on June 15, 1995, in Anchorage, Alaska, before a panel of the Alaska Labor Relations Board, with Chair Alfred L. Tamagni, Sr., and Member Raymond P. Smith, participating at the hearing, and Member Robert A. Doyle, participating on the basis of a review of the record. Hearing Examiner Jan Hart DeYoung presided. The record closed on June 15, 1995.

Appearances:

William K. Jermain, Jermain, Dunnagan & Owens, P.C., for complainant Alaska Community Colleges' Federation of Teachers, Local 2404, AFT, AFL-CIO; Patrick J. McCabe, Owens & Turner, P.C., for respondent University of Alaska.

Digest:

An offer, even an illegal offer, is not an unfair labor practice by itself unless the offeror insists on it to impasse. Requiring the parties to bargain before the Agency finds a contract proposal to be an unfair labor practice better serves the process of negotiations by requiring the parties to attempt to work out their differences before resorting to administrative procedures.

DECISION

The question presented in this case is whether the University's opening contract proposal, which the Alaska Community Colleges' Federation of Teachers (ACCFT) argues is illegal, violated the duty to bargain in good faith under AS 23.40.110(a)(5). We do not believe, however, that the presenting issue is the real dispute between the parties. The parties' relationship has been contentious almost from the beginning. See e.g., Alaska Community College Federation of Teachers, Local No. 2404 v. University of Alaska, SLRA Order & Decision No. 84 (Oct. 31, 1983). We believe the relationship between the parties has not recovered from the effects of consolidation of the University and community colleges and the near demise of the ACCFT. In re Alaska Community College Federation of Teachers and University of Alaska, Arbitrator's Decision & Award Phase II, at 2 (Jan. 5, 1990) (Tim Bornstein), Exh. 12. The principal representatives of each party remain the same and the level of personal animosity between them at the hearing in this case was palpable. The representatives have not been able to put the past behind them and have not developed an effective working relationship. We urge the parties to address what we consider to be the real problem and cooperate

toward developing an effective working relationship.

The issue in this case illustrates the problems between the parties. As ACCFT interpreted the University's offer, it would reduce benefits of senior members of the bargaining unit dramatically. The benefits changes would compare unfavorably with the benefits paid nonbargaining unit instructional staff at the University. The changes would also impose a financial burden on the ACCFT. There is a difference between being tough in negotiations and being insulting and such an offer would have verged on the latter. On the other hand, the University claims that its offer was misunderstood. Discussing the offer and the legal issues raised would have provided an opportunity for the University to clarify any ambiguities and correct any legal problems. Merely making a bargaining proposal is not so inherently destructive of rights protected under the Public Employment Relations Act that it should sustain an unfair labor practice charge without some evidence of antiunion motivation. It is at least possible that the parties could reach an understanding after discussion without Agency interference. Short circuiting discussion by filing a charge prematurely does not provide the bargaining process an opportunity to work and does not promote the aims of PERA. The parties need to attempt to work out their problems before resorting to time consuming and costly administrative remedies. We will not adopt a rule of law that cuts short normal procedures.

A hearing was conducted on June 15, 1995, at which the parties presented testimony and other evidence. The record closed that same day. Upon consideration of the record, the panel finds the

facts as follows:

Findings of Fact

1. The Alaska Community Colleges' Federation of Teachers, Local 2404, AFT, AFL-CIO (ACCFT), was certified in 1974 as the bargaining representative of a unit of instructional staff at the University of Alaska. Agreement § 1.2 (1992-1994), Exh. 1, at 1.

2. The parties have had a fairly contentious relationship over the years. Most notable was the dispute that arose from the consolidation in 1987 of the 14 community colleges and the three regional universities. In re Alaska Community College Federation of Teachers and University of Alaska, Arbitrator's Decision & Award Phase II, at 2 (Jan. 5, 1990) (Tim Bornstein), Exh. 12. History professor Ralph McGrath is a charter member of ACCFT and has served on its executive board all but two years. McGrath has been president of ACCFT since consolidation.

3. The parties most recent collective bargaining agreement expired on June 30, 1994. Agreement § 1.1A, Exh. 1, at 1. The parties began negotiating a successor agreement in April of 1994.

4. The principal negotiators are Stevan DeSoer, assistant vice president for employee relations, for the University and Ralph McGrath, president of ACCFT, for ACCFT.

5. On May 9, 1994, DeSoer submitted the University's initial proposal. Proposal (May 8, 1994), Exh. 2. The proposal did not include terms addressing retention, promotion, sabbatical leave, salaries and benefits. Id., at 8 & 17.

6. On June 14, 1994, the University submitted the remaining proposals on retention, promotion, sabbatical leave, salaries and benefits. Proposal (June 8, 1994), Exh. 3. In the 1992-1994 agreement these subjects had been covered by cross reference to the University Board of Regents' policy applying to all faculty regardless of unit status. Agreement § 6.1, Exh. 1, at 8.

7. The proposal on retention departs from the Regents' policy that now applies to both unit and nonunit instructional staff. The regent's policy is a tenure-track system, providing some security against termination. Regent's Policy 04.04.04, Exh. 5, at 8-9. The proposal, on the other hand, would provide initially for a faculty member to review the issue of retention before the October of the instructor's second year of appointment. It would require a second review in the third year. The decision whether to retain an instructor would be made during the third year of an appointment. There would be review and approval at several levels, with the decision made by the chief academic officer. The chief academic officer's decision could be appealed to the chancellor, whose decision would be final. The question of retention would be reexamined in the third year of each following five-year appointment period. Again, there would be

several levels of review and approval; the decision would be made by the chief academic officer, appealable to the chancellor, whose decision would be final. The section further provides, "The University's decision under the provisions of this Article may not be overturned unless it is determined to be arbitrary, capricious or contrary to law." Proposal (June 8, 1994), Art. 3.4C, Exh. 3, at 5.

8. The proposal on promotion also differs significantly from the Regent's policy. The current system on promotion provides for faculty to recommend promotion and allows some review of decisions not to promote. Regent's Policy 04.04.06, Exh. 5, at 16. The proposal would provide for review culminating in an appeal to the chancellor, whose decision would be final. Like the proposal on retention, the University's decision "may not be overturned unless it is determined to be arbitrary, capricious, or contrary to law." Proposal, Art. 3.5E, Exh. 3, at 6.

9. While the sabbatical provisions are more detailed in the University's contract proposal, they do not appear to depart significantly from Regent's policy with the exception of a repayment requirement. Applications for sabbatical leave currently are governed by Regent's policy for all instructional staff. The policy provides for applications to the chancellor for sabbatical leave after five years of service according to approved procedures. Regent's Policy 04.04.06, Exh. 5, at 16-17. The University's proposal on sabbatical leave provides for leave to be granted "at the sole discretion of the University." Proposal, Art. 3.6A, Exh. 3, at 8. It also provides detailed application procedures, compensation conditions, and repayment requirements if the instructor does not remain employed by the University for a set period.

10. The University's salary proposal would maintain rates of pay at the current rate, providing for increases only upon promotion to a higher rank. Proposal, Art. 8.1, Exh. 3, at 12. It also would set a salary schedule for new hires. Proposal, Appendix B, Exh. 3, at 18.

11. The University's pension benefit proposal was particularly controversial. The proposal would exempt pension benefit issues from grievance arbitration. Proposal, Art. 8.2H, Exh. 3, at 16. It would provide for all bargaining unit members to participate in the University of Alaska pension plan. Those vested in TRS could leave their funds there or transfer them to an employer defined contribution plan. Members who were not vested would be required to transfer to the employer defined contribution plan. Id.

12. The parties arranged to meet on July 14, 1994, after McGrath had an opportunity to review the University's new proposals.

13. When the parties next met on July 14, 1994, McGrath announced that he considered the proposals to be illegal and an unfair labor practice and that he had filed an unfair labor practice with this Agency. UA/ACCFT negotiations notes, Exh. E.

14. On July 14, 1994, the ACCFT filed an unfair labor practice complaint alleging violations of AS 23.40.110(a)(1), (3), and (5). Included in the complaint were allegations that certain University proposals were illegal and therefore violated the duty to bargain in good faith in AS 23.40.110(a)(5). ACCFT alleged that, by making proposals to exclude nonretention, promotion, and sabbatical leave from binding arbitration the University violated Hemmen v. State of Alaska, 710 P.2d 1001 (Alaska 1985). ACCFT also alleged that the University's proposal to eliminate supplemental benefits and return to the social security system and to substitute a defined contribution retirement plan for the Teachers Retirement System currently covering employees violated Hammond v. Hoffbeck, 627 P.2d 1052 (Alaska 1981). ACCFT further alleged that the subject of retirement benefits was an illegal subject of bargaining under 3 Alaska Op. Att'y Gen. 1978, 1978 WL 18305 (Jan. 23, 1978) (addressing the effect on bargaining of the PERS system in AS 39.35.). In addition, ACCFT alleged that certain bargaining proposals violated rights protected under AS 23.40.110(a)(1) and discriminated in violation of AS 23.40.110(a)(3).

15. The Agency investigated the charges. It found probable cause to support violations of AS 23.40.110(a)(1),(3), and (5).

16. The Agency found that the following charges were not supported by probable cause and dismissed them: charges that proposals concerning nonretention and promotion eliminated property rights in violation of constitutional rights; charges that the health plan proposed was impossible to perform because it required ACCFT contributions; and charges that the University induced ACCFT forbearance of unilateral health benefit changes with false promises.

17. On January 10, 1995, the Agency issued a notice of accusation on those charges found after investigation to be supported by probable cause.

18. On January 25, 1995, the University filed its notice of defense.

19. On February 24, 1995, the University submitted a new contract proposal, responding, at least in part, to arguments made by ACCFT in its unfair labor practice charges in this case. The proposals in large part adopt by reference the Regent's policy on those subjects. The effect of those proposals would be to eliminate differences between ACCFT bargaining unit instructional staff and other University instructional staff on those subjects. Proposal (Feb. 24, 1995), Exh. C, at 13, 17-18.

20. The case was heard on June 15, 1995.

Conclusions of Law

1. The University of Alaska is a public employer under AS 23.40.250(7) and the Alaska Community Colleges' Federation of Teachers, Local 2404, AFT, AFL-CIO is a labor organization under AS 23.40.250(5). This Agency has jurisdiction under AS 23.40.110 to consider this complaint.

2. Complainant has the burden to prove each element of its case by a preponderance of the evidence. 8 AAC 97.350(f).

3. Decisions of the National Labor Relations Board and federal courts are given great weight by this Agency in its decisions and orders and in determining what constitutes an unfair labor practice. 8 AAC 97.240(b); 8 AAC 97.450(b).

4. The charges referred for hearing in this case are of violations of AS 23.40.110(a)(1),(3), and (5).

I. AS 23.40.110(a)(5): Refusal to bargain in good faith

5. AS 23.40.110(a)(5) provides,

> A public employer or an agent of a public employer may not . . . refuse to bargain collectively in good faith with an organization which is the exclusive representative of employees in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.

6. The question presented under AS 23.40.110(a)(5) is whether it is a violation of the duty to bargain in good faith to make a proposal in bargaining that, if adopted, would impose an obligation that is illegal. ACCFT argues that several of the University's proposals were illegal and this Agency should find that these illegal proposals were a violation of the duty to bargain in good faith. One court has addressed this question under

the similar provisions of the National Labor Relations Act and said that making such a proposal by itself is not sufficient to support a finding of bad faith bargaining. Seattle-First National Bank v. N.L.R.B., 638 F.2d 1221, 106 L.R.R.M. (BNA) 2621 (9th Cir. 1981).

7. There is no precedent under the National Labor Relations Act supporting the conclusion that making the illegal proposal, without more, violates the duty to bargain in good faith. There are cases in which insisting on an illegal provision to impasse or conditioning continued bargaining on agreeing to the illegal proposal can be evidence of bad faith. See, e.g., United Steelworkers of America Local 4102 and Capitol Foundry Div'n, 199 N.L.R.B. No. 20, 81 L.R.R.M.(BNA) 1188 (1972) (where union insisted to impasse and struck on clause that was arguably illegal under state law).

8. ACCFT asks this Agency to find that the act of making an illegal proposal is so destructive of labor relations and the bargaining process that it should be a per se violation of the duty to bargain in good faith. Ordinarily, to prove a violation of the duty to bargain in good faith, a party must show, by a totality of the circumstances, evidence of an attitude inconsistent with reaching agreement. Certain practices, however, have been found so destructive to bargaining

and the bargaining relationship that the conduct alone is a violation of duty, regardless of any showing of intent. These per se violations include an employer's unilateral changes to terms and conditions of employment, bargaining directly with employers, and insisting on nonmandatory subjects of bargaining. See generally 1 Patrick Hardin, The Developing Labor Law 596-607 (3d ed. 1993)(discussing per se 8(a)(5) violations). The National Labor Relations Board has found these practices interfere with bargaining and the bargaining relationship and have concluded that proof of the act alone is sufficient to establish a violation of section 8 (a)(5).

9. We disagree that making illegal proposals in bargaining is so destructive of bargaining and the parties' relationship that the act should be a per se violation. There needs to be an opportunity in bargaining for misunderstandings to be resolved and mistakes to be corrected before a party is found in violation of the duty to bargain in good faith. Allowing this opportunity in the give and take of bargaining should promote rather than detract from the negotiations process.

10. We adopt the position of the Ninth Circuit Court of Appeals, which has held that the NLRB may consider the content of bargaining proposals when it examines whether a party acted in good faith in negotiations but that "inferences drawn from those proposals are not alone sufficient to support a finding of a violation of the obligation to bargain in good faith." Seattle First National Bank v. N.L.R.B., 638 F.2d at 1226, 106 L.R.R.M.(BNA) at 2624; see, e.g., Brownsborough Hills Nursing Home, Inc., 244 N.L.R.B. No. 47, 102 L.R.R.M.(BNA) 1118 (1979) (onerous offer was one factor among others demonstrating attitude inconsistent with reaching agreement).

11. In this case, the test to apply to the University's conduct under AS 23.40.110(a)(5) is the totality of the circumstances test. In examining the totality of the circumstances, this Agency may consider the illegality of any proposals. The totality of the circumstances in this case does not show a pattern of conduct from which it could be concluded that the University acted in bad faith. The circumstances simply summarized are that the University and ACCFT met to bargain and the University presented a partial proposal. The parties met a second time about one month later and the University made a second proposal that addressed the subjects omitted in the first proposal. The parties agreed to meet a third time after ACCFT had an opportunity to review the proposal. At the third meeting ACCFT announced that certain proposals were illegal and it was therefore filing an unfair labor practice charge. Even if we were to assume that ACCFT's interpretation of the proposals and their legal consequences is correct, we could not conclude on the basis of these circumstances that the University bargained in bad faith.

12. Because we determined that making a contract proposal that included illegal terms was not a per se violation and that the totality of the circumstances in this case, including the making of illegal proposals, did not establish an unfair labor practice under AS 23.40.110(a)(5), we are not required to address whether any of the University's proposals were in fact illegal. We therefore do not address whether the proposal to exclude nonretention, promotion and sabbatical leave from binding arbitration under the agreement's grievance procedure would violate Hemmen v. State of Alaska, 710 P.2d 1001 (Alaska 1985); whether changing retirement plans is unconstitutional under Hammond v. Hoffbeck, 627 P.2d 1052 (Alaska 1981); or whether the subject of retirement benefits is an illegal subject of bargaining because it is established by statute, 3 Alaska Op. Att'y Gen. 1978, 1978 WL 18305 (Jan. 23, 1978).

II. AS 23.40.110(a)(1): Interference with Protected Rights.

13. Conduct that violates AS 23.40.110(a)(5) can also interfere with rights protected under AS 23.40.110(a)(1) and violate that section as well. See generally 1 Patrick Hardin, supra, at 75 (discussing derivative section 8(a)(1) violations). Because we have found that the University did not violate AS 23.40.110(a)(5) in its bargaining, we conclude that the University did not commit a "derivative violation" of AS 23.40.110(a)(1).

14. Moreover, ACCFT has not proven facts that would constitute an independent violation of this section.

III. AS 23.40.110(a)(3): Discrimination to encourage or discourage union membership.

15. AS 23.40.110(a)(3) provides that it is an unfair labor practice for an employer to "discriminate in regard to hire or tenure of employment or a term or condition of employment to encourage or discourage membership in an organization." Discriminating in terms or conditions of employment can violate this section if "the discrimination is motivated by an antiunion purpose and has the foreseeable effect of either encouraging or discouraging union

membership." 1 Patrick Hardin, supra, at 190, citing Retail Clerks Local 770, 208 N.L.R.B. No. 54, 85 L.R.R.M.(BNA) 1082 (1974). Since not all discrimination violates this subsection, the "reason for the discrimination will determine whether [the employer] has committed an unfair labor practice." Id.

16. ACCFT argues that the University violated paragraph (a)(3) by presenting proposals on promotion and nonretention in bargaining that were substantially different than those presently enjoyed by nonbargaining unit members of the faculty. The facts showed that the University offered contract proposals in bargaining that differed from other nonunit University employees. However, ACCFT did not present any evidence beyond the bargaining proposals themselves. We cannot infer an unlawful purpose from those proposals.

17. The fact that the proposals would have resulted in differences between represented and nonrepresented instructional staff, alone, does not support the conclusion that the University acted with an antiunion motive. The parties must have the latitude to negotiate different terms from nonunit employees or there would be no purpose in negotiating with the bargaining representatives.

18. We conclude that the University did not violate AS 23.40.110(a)(3) by making proposals that would have created differences between unit and nonunit employees.

ORDER

1. Because we find the University of Alaska did not violate AS 23.40.110(a)(1), (3), or (5) when it made its initial bargaining proposal in negotiations with Alaska Community Colleges' Federation of Teachers, we **DISMISS** the unfair labor practice complaint filed in this case.

2. The University of Alaska is ordered to post a notice of this decision and order at all work sites where members of the bargaining unit affected by the decision and order are employed or, alternatively, serve each employee affected personally. 8 AAC 97.460.

ALASKA LABOR RELATIONS AGENCY

Alfred L. Tamagni, Sr., Chair

Robert A. Doyle, Board Member

Raymond P. Smith, Board Member

APPEAL PROCEDURES

An Agency decision and order may be appealed through proceedings in superior court as provided in the Alaska Rules of Appellate Procedure and the Administrative Procedures Act.

The decision and order becomes effective when filed in the office of the Agency, and unless proceedings to appeal it are instituted, it becomes final on the 31st day after it is filed.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Decision and Order in the matter of ALASKA COMMUNITY COLLEGES' FEDERATION OF TEACHERS, LOCAL 2404, AFT, AFL-CIO vs. UNIVERSITY OF ALASKA, CASE NO. 95-319-ULP, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 26th day of September, 1995.

Victoria D.J. Scates

Administrative Clerk III

This is to certify that on the 26th day of September, 1995, a true and correct copy of the foregoing was mailed, postage

prepaid to

William K. Jermain\ACCFT

Patrick J. McCabe\University

Signature